No. 21,629

IN THE

United States Court of Appeals

For the Ninth Circuit

STEWART L. UDALL, Secretary of the Interior, STATE OF ALASKA,
Appellants,

vs.

ANDREW J. KALERAK, JR., et al.,
Appellees.

On Appeal from the United States District Court, District of Alaska

BRIEF FOR APPELLANT STATE OF ALASKA

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Subject Index

Table of Authorities Cited

Cases

Statutes

Other Authorities

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JURISDICTIONAL STATEMENT

This appeal originated from decisions of the Anchorage, Alaska office of the Bureau of Land Management accepting a selection application by the State of Alaska and refusing to accept for recordation notices of settlement or occupancy claims of appellees for lands in conflict with the State's selection. Appeal was taken to the Office of Appeals and Hearings, Bureau of Land Management and then to the Secretary of Interior. The District Court had jurisdiction

by reason of the Administrative Procedures Act, 5 U.S.C., Sec. 1001 et seq., and, in particular, 5 U.S.C., Sec. 1009.

Jurisdiction is conferred on this Court by Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

The Alaska Statehood Act of July 7, 1959 (72 Stat. 339) permitted the State of Alaska to select a quantity of Federal lands within the State to become State lands.

On January 8, 1963, the State of Alaska filed a formal selection application, A-058566, for 26,880 acres of land as part of its allotment under the Statehood Act. (R. 179.) The lands involved were deemed necessary as a future water source for the Greater Anchorage area. At the time of this application the lands were in part subject to paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, withdrawing them from all forms of appropriation for the protection of the water supply of the City of Anchorage. (R. 178.) The State's selection was posted in the appropriate land and status records. (R. 179.)

On April 8, 1963, the Department of Interior issued Public Land Order 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of Public Land Order 576, *supra*. On the same day, April 8, 1963, the State filed an amendment to its application adding certain acreage to it. Three subsequent amendments

were filed on May 24, 1963, March 13, 1964 and March 17, 1964.

On October 8, 1964, the Land Office at Anchorage issued a decision stating that the selected lands were then segregated from all appropriations under the Public Land Laws and directing the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks. (R. 181.) This publication was accomplished within the time allowed. (R. 181.)

More than two years after the State's application, on May 27, 1965, Andrew Kalerak, Jr. filed a Notice of Location of Settlement of Occupancy Claim in Alaska, Anchorage 058566. (R. 181.) The Land Office refused to accept the notice for recordation on the grounds it was in conflict with the State's selection. Subsequent claims of the other appellees were rejected on the same grounds.

Kalerak appealed to the Office of Appeals and Hearings where the decision of the Anchorage Land Office was reversed. (R. 29.)

The State of Alaska appealed to the Secretary of Interior and the claims of the other appellees were consolidated at that point. (R. 177.)

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PRIMA FACIE VALID APPLICATION OF THE STATE OF ALASKA, WHICH REMAINED OF RECORD, DID NOT SEGREGATE THE LAND IN QUESTION FROM SUBSEQUENT APPROPRIATION.

A decision on the propriety of the rejection of appellee's homestead application by the Land Office requires a careful distinction between selection and segregation as these terms apply to public lands. Even assuming *arguendo* that the State's *selection* was invalid, its application for selection, so long as it remained of record in the Land Office, *segregated* the land from subsequent appropriation and required rejection of appellee's applications. *Bunker Hill v. United States,* 226 U.S. 548, 57 L.Ed. 345 (1913); *Hodges v. Colcord,* 193 U.S. 192, 48 L.Ed. 677 (1905); *McMichael v. Murphy,* 197 U.S. 303, 49 L.Ed. 767 (1905); *Hastings & Dakota Ry. Co. v. Whitney,* 132 U.S. 357, 33 L.Ed. 363 (1889); *Southern Pacific R. Co. v. Ambler Grain & Milling,* 66 F.2d 670 (9th Cir. 1933); *Neff v. United States,* 165 Fed. 273 (8th Cir. 1908); *Germania Iron Co. v. Jones,* 89 Fed. 811 (8th Cir. 1898); *Putnam v. Ickes,* 78 F.2d 223 (D.C. Cir. 1935); *Max L. Krueger,* 65 I.D. 185 (1958); *R. B. Whitaker, et al.,* 63 I.D. 124 (1956); *B. E. Van Arsdale,* 62 I.D. 475 (1955); *Arizona,* 55 L.D. 249 (1935); *Keating v. Doll,* 48 L.D. 199 (1921); *Youngblood v. New Mexico,* 46 L.D. 109 (1917); *Hall v. Oregon,* 32 L.D. 565.

At the time that the appellee's applications for homestead entry were filed, and for approximately

two years prior thereto, the land in question had been within the public domain subject only to the State's formal selection application, A-058566, which application the Land Office had treated as regular, accepted, recorded and posted. In light of the State's prima facie valid application present in the public record the Land Office properly rejected the appellee's application and in doing so it

> ". . . adhered to the rule of long standing that a [state] selection, regular on its face when filed, . . . has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications. . . ."
>
> *State of New Mexico,* 46 L.D. 217, 222 (1912).

The salutary policy effectuated by the segregation doctrine as applied throughout the history of American land law is demonstrated by the instant case. The purpose of that policy is to accord to all persons an equal opportunity to apply for a portion of the public domain.

> As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands

were available. Decision of the Secretary of Interior, below. (R. 188.)

An excellent discussion of the segregation rule and the policy which it advances appears in *Germania Iron Co. v. Jones, supra,* wherein the Secretary of Interior had issued an opinion deciding that the original entry on the lands involved was fraudulent and void and the land open to disposal. Subsequent to the Secretary's decision, but prior to the cancellation of the fraudulent entry on the books of the local land office, James applied for the land. The court held that the original entry, although fraudulent, segregated the lands and that

> ". . . no subsequent entry of the land could be made until that decision (of the Secretary of Interior) was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records." 89 Fed. at 815.

The court demonstrated that this rule will assure all who intend to apply for the land an equal opportunity to do so and will prevent those who go behind the public record from gaining an unjust advantage.

The United States Supreme Court in *Hastings & Dakoto Ry. Co. v. Whitney, supra,* cites the first case recognizing the segregation principle and calls it "one of the fundamental principles underlying the land system of this country." In that case, as here, it was argued that an entry was "invalid on its face" and thus was of no effect. The court held, however, that:

> . . . if, notwithstanding these defects [in making entry], the application is allowed by the land officers, . . . and the entry is made of record, such entry may be afterwards cancelled on account of those defects. . . . But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.

A filing is prima facie valid and segregates land covered if it has been entered on the public land records and the decision of the land office to allow it has not been reversed. In this case, the legality of the State's filing was passed on favorably by the land office and its decision was upheld by the Secretary of the Interior.

In two later cases involving the Oklahoma "land rush" the Supreme Court confirmed the principle that a filing segregates land from further appropriation. In both cases claimants entered land in Oklahoma prior to the legally established time of opening of the land for settlement and were therefore not eligible to make a valid entry. However, claimants' entries, although premature, were prima facie valid, since *nothing on the face of the record* showed that claimants had entered the land prior to its opening for settlement. In both cases the court found that, while

the claimants gained no rights by their invalid entries, the effect of the entries was to segregate the land.

In *Hodges v. Colcord, supra,* the court held as to the claimant's entry:

> This prima facie valid entry removed the land, temporarily, at least, out of the public domain, and beyond the reach of other homestead entries. 193 U.S. at 194.

The other case, *McMichael v. Murphy, supra,* held as to an entryman who entered land while a prior invalid entry stood on the record:

> [The second entryman's] entry, having been made at a time when [the first entryman's] entry remained uncancelled, or not relinquished, of record, conferred no right upon him, for the reason that [the first entryman's] entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. 197 U.S. at 312.

In *Southern Pacific R. Co. v. Ambler Grain & Milling Co., supra,* this Court considered a case where a homestead entry, subsequently abandoned, remained of record at the time of a selection of railroad grant lands. Applying the segregation rule this Court held that the homestead entry segregated the land so that no title could pass to the railroad under the grant from the government notwithstanding the fact that fee title was in the United States when the grant was made.

For other cases sustaining the segregation rule, see *Bunker Hill v. United States, supra; Neff v. United States, supra;* and *Putnam v. Ickes, supra.*

Consistent with the foregoing authorities the Department of Interior has repeatedly applied the segregation rule in furtherance of its policy that all persons interested in land should be able to rely upon land office records, and thus have an equal opportunity to apply. Thus, in *Keating v. Doll, supra,* Doll filed a homestead application on a parcel in a National Forest withdrawal and the entry was allowed (by error) by the local land office. When the withdrawal was later revoked and the land became available for entry, the otherwise valid application of Keating was rejected as in conflict with Doll's. The Department ruled that Keating's application was properly rejected because the premature filing of Doll segregated the land so long as it remained of record. Similarly a state school land selection which required approval of the Secretary of Interior was found to segregate the land encompassed pending final consideration by the Secretary and thus required refusal of a subsequent application to purchase under the Timber and Stone Act. *Hall v. State of Oregon, supra.* See also, *Youngblood v. New Mexico, supra,* wherein the Secretary stated:

> "Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of local land office."

Again in *State of New Mexico, supra,* it is stated

> . . . the Department has invariably adhered to the rule of long standing that a [State] selection,

> regular on its face when filed, . . . has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications. . . . 46 L.D. at 222.

Bearing in mind the reason for the segregation rule it becomes apparent that neither the type of application nor its circumstances are determinative of the segregative effect which it is accorded. Thus, in *B. E. Van Arsdale, supra,* a prior noncompetitive oil lease which had been relinquished and cancelled but the cancellation of which had not entered on the official plat records was given segregative effect. The Secretary of the Interior ruled

> ". . . [B]ecause of the importance of making lands available at the same time to all persons who wish to apply for a noncompetitive lease, it is necessary to treat the land as unavailable to anyone for leasing until the cancellation is noted on the tract books of the office which issues the leases. . . . a uniform rule as to when land becomes available for leasing must be strictly enforced to insure all who wish to apply an equal chance to do so." 62 I.D. at 478.

In order to effectuate the segregation rule, a circular approved by Secretary of Interior Hitchcock and issued July 14, 1899, stated

> ". . . It is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry

> has been cancelled upon the records of the local office." 29 L.D. 29.

This directive is still in effect.

For other decisions see *Max L. Krueger, supra; R. B. Whitaker, supra.*

In the instant case there was in effect at the time the State of Alaska first filed its selection and additional pertinent regulation which described the effect of the State's action as follows:

> Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9 (a) (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management. 43 C.F.R. 1964 rev., 76.16 (Now 2222.9-5(6).)

Thus, in order to "segregate" land from "all appropriations" the State needed only to file an application for selection properly describing the lands desired. The regulation does not require that the lands applied for be available for filing *at that time,* that they be eligible for selection, or that the selection be finally carried to patent. This regulation affirms the 1899 directive from Secretary of Interior Hitchcock, *supra,* and is consistent with a principle of law which antedates *Hastings & Dakota Ry. Co. v. Whitney, supra,* (1889).

Citing many of the above authorities the Deputy Solicitor, writing the opinion for the Secretary of the Interior below, decided

> "These decisions make it abundantly clear that the lands covered by the State [of Alaska] selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid." (R. 188)
>
> "The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department's salutary policy of giving all applicants an equal chance to acquire public land."
>
> "Accordingly the land office, as required by the pertinent regulation, *supra,* properly rejected the notices of settlement or occupancy." (R. 188)

In reversing the decision of the Secretary of Interior the District Court expressed the erroneous belief that to apply the segregative effect of Section 76.16 C.F.R. in this case would result in an unintended preference right for the State of Alaska. It is apparent that the District Court failed to distinguish between a selection and a segregation, for segregation has no relationship to the validity of the application which brings it into play. Application of the segregation rule in this case merely requires rejection of the appellee's applications and would not validate the application of the State of Alaska.

The instant case affords a classic example of the policy which the segregation rule advances. Confronted with a state selection application which was valid in form, had been approved by the Land Office and accepted, had been published in an Anchorage newspaper for five consecutive weeks and remained intact on the records of the local land office for nearly two years, a potential applicant who relied upon the record would not be expected to apply. Appellees, however, in reliance on an alleged technical defect, went behind the record and sought to gain a marked advantage over those who relied upon the records to inform them whether or not the lands were available. It was the decision of the Secretary of Interior applying the segregation rule, which served ". . . to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just and reasonable." *Germania Iron Co. v. Jones, supra,* p. 815. That decision should be affirmed.

II

THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE SECRETARY OF INTERIOR THAT THE AMENDMENTS FILED BY THE STATE DURING ITS STATUTORY PREFERENCE RIGHT PERIOD WERE THE EQUIVALENT OF REFILING THE ORIGINAL APPLICATION.

Subsequent to the issuance of Public Land Order 3022, revoking the withdrawal which had embraced the lands in question, the State of Alaska amended its application four times. Two amendments were filed during the 90 day statutory preference period

and two thereafter. All of these amendments were filed prior to publication of the State's notice of application, and before any of the appellees entered the land or sought to establish any rights to the land by application or settlement.

The Deputy Solicitor decided that the Department of Interior need not insist on a new filing to replace the State's original "premature" one, because a new filing would be an unnecessary formality. The filing of amendments during the preference period demonstrated that the State had exercised its preference right. The Department of Interior held that filing of an amendment to an application is deemed a refiling of the original selection and that the State's rights can be determined as if the original selection had been filed at the time the amendment was filed. Since the State's first two amendments were filed during the preference period, the State exercised its preference right and established its claim to the selected lands.

The Department of Interior has allowed this procedure in similar cases. For example, in *Hunt v. State of Utah,* 59 I.D. 44, 47 (1945), the State filed on land which at the time was in a withdrawal, and on which the State would have no preference right even after its restoration. The Department held that the State gained no priority by its premature filing, but gave effect to the State's selection in the following manner:

> It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the

> original application should be regarded as having effect only as of the time of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application.

The State's application was deemed filed only at the time of its reinstatement and was subject to any rights which were acquired by a prior application.

In the case of a railroad which had filed on land prior to its availability, the Department, in the absence of intervening rights, allowed the original filing to be treated as valid after the land became available. The railroad was not required to file a second application, even though the first one was invalid. The Department explained:

> The railroad company having at all times prior [to the opening of the land] manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original [invalid] selection could have been and was allowed as to the tracts free from adverse claim. . . . *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Where there are no prior adverse rights to consider the Department of Interior need not insist upon a mere formality.

The practice of allowing a State to file premature applications, so long as this does not prejudice any applicant filing on the day the lands become available, is not a novel one. In *State of California v. Koontz,*

et al., 32 L.D. 648 (1904), state selections filed before land was available were considered as being filed on the day the land became available and after the applications of those present at the land office on opening day.

The Department of Interior in this case held that amendments filed by the State during and after the preference period but nearly two years before the appellees filed, reaffirmed the State's original selection. Since the State had at all times shown its intention to acquire the selected lands, it would serve no purpose to require it to file a duplicate of the application already on file. Thus the Department treated the State's original application as refiled and effective at the time first amendment was filed.

The appellant contends that a fair reading of the decision will demonstrate that the Secretary of Interior reached an entirely reasonable result reflecting sound administrative practice. Nothing in that decision has been shown to be contrary to law and the Secretary's decision should have been affirmed.

III

THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE SECRETARY OF INTERIOR THAT THE STATE'S ORIGINAL APPLICATION COULD BE ACCEPTED.

The fact is unquestioned that at the time the State of Alaska filed its original application, A-058566, most of the land involved was withdrawn pursuant to paragraph 4 of Public Land Order No. 576 of March 29,

1949, 14 F.R. 1614 for protection of the water supply of the City of Anchorage. It is further unquestioned that the Alaska Statehood Act of July 7, 1959 (72 Stat. 339), Section 6(b), allows for selection by the State

> ". . . from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection."

As a general rule an application filed while land is withdrawn is without effect and does not become effective upon revocation of the withdrawal. To determine whether the general rule should be applied in this case so as to require rejection of the State selection, the decision of the Secretary of Interior examined the practical and theoretical reasons underlying the principle.

The Deputy Solicitor pointed to two objections to allowing applications to be filed for lands before they are open to appropriation. First is the administrative burden such filings would involve. If premature filings on withdrawn land generally were allowed, the public land records would be burdened with thousands of applications which could not possibly be acted on in the foreseeable future. See *J. G. Hathaway, et al.*, 68 I.D. 48, 52 (1961). (R. 189)

Second, it would be inequitable to give effect to a premature application because this would be equivalent to granting an unintended preference right after the land becomes available. The purpose of the rule against premature filing is to assure all members of the public an equal opportunity to file. (R. 189) The

inequity ordinarily involved in allowing a state to file for land while it is still withdrawn is vividly pointed out in *State of Arizona,* A-18816, etc. (Oct. 16, 1935), (see page 15, Decision of Secretary of Interior R. 191). In that case the State filed for lands subject to temporary withdrawal under the Taylor Grazing Act. While conceding that the selection was invalid, the State urged that the selections be allowed to remain of record. The State's theory was that upon revocation of the withdrawal and opening of the land to appropriation by the public, the State's selection would attach instantly and preclude all subsequent applications filed by members of the public.

The problem with Arizona's theory was that this procedure would give the State a preference right for which there was no statutory basis. The Department held:

> There is nothing in section 8 of the Taylor Grazing Act [under which the land would be re-opened to entry] which accords preference to the State . . . , and no circumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to [appropriation]. Action suspending these [invalid State] selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal . . . is tantamount to provisions in the order of restoration that [selections] under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. *State of Arizona, supra.* (Emphasis added.)

The crux of this decision is that premature filing by the State, if allowed, would in effect have been a grant to the State of a preference right over members of the public *for which there was absolutely no statutory basis.* Allowing a premature filing in such circumstances would, of course, be inequitable.

The reasons for generally applying the rule against premature filing are compelling. The question is whether the reasons for the general rule exist in this case. If the reasons for the rule do not exist here, then the rule is not applicable and a different result may be reached.

Since the State is the only applicant allowed to file "prematurely" under the blanket selection procedure, no undue administrative burden is imposed on the land office. There is, as the decision of the Secretary of Interior below points out, no possibility that hundreds of other applicants will clutter the records with their premature filings.

More significant is whether allowing the State to file "prematurely", before anyone else, is equitable. Any possibility of inequity is removed by the following fact: *the State of Alaska has a statutory preference right to all lands restored from withdrawal,* granted to it by Section 6(g) of the Alaska Statehood Act (72 Stat. 339). The existence of this statutory preference right distinguishes the State of Alaska's situation from that of the State of Arizona's in the decision cited above. Thus the fact that the State was given an opportunity to file on restored land before other persons is in no way inequitable. As the decision of the

Secretary of Interior indicates, use of the "premature" filing merely advanced the time in which the State could make its statutory preference known. Since the State had a statutory preference right, it is not inequitable to allow the State a chance to make its preference known to the Land Office and the public even before desired land was restored to the public domain.

If one purpose of the rule against filing on withdrawn land is to ensure to all equality of opportunity to file, then the rule certainly has no application here. Congress, through the Statehood Act, expressed its intention that there be no equality of filing in the case of restored land, since it gave the State of Alaska a preference right which allows it to prevail over all other applicants, regardless of the order of filing. No one is in the least harmed or disadvantaged if the State is allowed to exercise its preference right by filing prior to the actual restoration of the land.

Clearly the reasons underlying the general rule on premature filing did not apply in this case. Thus the Department exercised its discretion in a reasonable manner in deciding that the rule did not apply and that the State's selection need not be rejected. This decision is entirely consistent with the intention of Congress that a preference right be granted to the State of Alaska by the Statehood Act. Any other conclusion would deprive the State of this valuable right, contrary to the intent of the Act.

As the Supreme Court of the United States recently demonstrated in *Lassen v. Arizona ex rel. Arizona*

Highway Department, 385 U.S. 458 (1967), there is no reason to read the land laws so as to impose restrictions on land transfers in which the abuses which the law intends to prevent are not likely to occur. So here, where no administrative burden will result and where it was intended that the State of Alaska have a preference right in land selection, the rule preventing such should not apply. The decision of the Secretary of Interior reaching this result was entirely reasonable and should not have been reversed.

Dated, Juneau, Alaska,
August 14, 1967.

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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